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Federal Courts--Diversity Jurisdiction of Foreign Corporations

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excuse for his failure to speak in denial." See also, 7 M.J. *Evidence* § 231 (1949); 80 A.L.R. 1259 (1932).

While West Virginia appears to be committed by the *Brooker* case to the view that such evidence is admissible, it is not quite as apparent just what weight this evidence is to be given. This issue was raised in the principal case when the accused, according to the reported facts, was convicted and sentenced to fifteen to twenty years imprisonment upon the corroborating testimony of an addict-informer and the implied admission by silence. Under Illinois law, as reported by the court, the testimony of one credible witness is sufficient to support a conviction for the unlawful sale of narcotics.

The *Brooker* case involved homicide rather than the unlawful sale of narcotics. The record presented to the court did not purport to contain all the evidence adduced at the trial and thus the court assumed that sufficient evidence existed. However, dicta in the *Brooker* case presented the issue as to the quantum of evidence, if any, necessary in addition to the admission by silence to support a conviction. The court stated that, alone, such an admission may be insufficient to convict. While the court recognized the duty of the jury to determine the weight to be accorded the evidence, it nevertheless indicated that, as a matter of law, it may be necessary that such an admission have the support of other evidence.

Thus, it appears debatable as to how much corroborating testimony will be necessary to carry the issue to the jury. Standing alone, an admission by silence might readily be challenged as insufficient evidence to constitute proof beyond a reasonable doubt and to support a conviction and severe sentence. The testimony of an addict-informer was sufficient corroborating testimony in the principal case to support a conviction and heavy sentence. The West Virginia court has indicated accord on the question but no clear and positive ruling has been rendered.

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P, a resident of Maryland, brought a libel action against *D* news service, a New York corporation, in the United States District Court for Vermont. Service was made upon an employee of *D* in Vermont.

P alleged a news dispatch transmitted by *D* from Georgia to Vermont contained a defamatory reference to him. The complaint did not allege the dispatch was printed or broadcast or that *P* had suffered any injury in Vermont. *D* moved to dismiss on the grounds of lack of personal jurisdiction, improper venue, and insufficiency of the complaint. The district court, not considering the jurisdiction or venue questions, dismissed. *Held,* reversed and remanded. A court without jurisdiction lacks power to dismiss a complaint for failure to state a claim. A federal district court exercising diversity jurisdiction must apply state and not federal standards in determining whether *D* foreign corporation was present within the district and amenable to service of process there. A dissenting opinion held that the adoption of a state standard implies discrimination ". . . against citizens possessing federal diversity rights." *Arrowsmith v. United Press International,* 320 F.2d 219 (2d Cir. 1963).

The problem of diversity jurisdiction over foreign corporations has been settled in the majority of the circuits for many years. Within a week of the decision in the principal case, three other cases were decided which are in accord. *Smartt v. Coca-Cola Bottling Corp.,* 318 F.2d 447 (6th Cir. 1963); *Walker v. General Features Corp.,* 319 F.2d 583 (10th Cir. 1963); and *Houston Fearless Corp. v. Teter,* 318 F.2d 822 (10th Cir. 1963).

Prior to the instant case, the Second Circuit relied on the "federal standard" to determine whether a foreign corporation was amendable to service of process. Their former position was expressed in *Jaftex Corp. v. Randolph Mills, Inc.,* 282 F.2d 508 (2d Cir. 1960). *X,* foreign corporation was impleaded by *D* sub-manufacturer. Service was made upon an agent of *X* within the jurisdiction. The issue of whether *X* was "present" or "doing business" within the jurisdiction arose. It was held that whether or not a foreign corporation is "present" within a district to permit service of process upon it is a question of federal law governing the procedure of the United States courts and is to be determined accordingly.

The difficulty with the *Jaftex* case is in finding a federal standard that is applicable. The decision in *Erie R.R. Co. v. Tompkins,* 304 U.S. 64 (1938), abolished the theory of a "federal common law," and the only rule applicable is in opposition to the *Jaftex* holding. FED. R. CIV. P. 4(d)(7) states that service is ". . . sufficient if the summons and complaint are served in the manner prescribed by any

statute of the United States or in the manner prescribed by the law of the state in which the service is made. . . ." There is no federal statute.

The majority opinion of the *Jaftex* case was written by Judge Clark. In his dissent in the principal case, Judge Clark concluded that the basis of the majority opinion was a misinterpretation of *Erie R.R. Co. v. Tompkins, supra,* which states, "a federal court exercising jurisdiction over . . . a case on the ground of diversity of citizenship is not free to treat this question as one of so-called 'general law,' but must apply the state law as declared by the highest state court." Judge Clark believes that this does not apply to procedural law, for in so doing, the basis of a federal court for enforcing a litigant's rights accorded by state law would be destroyed.

The majority opinion held that FED. R. CIV. P. 4(d)(3), urged by Judge Clark as the federal standard, instructs as to how a foreign corporation may be served, but fails to instruct as to when such corporation is subject to service. It would appear logical that, no federal standard being found, the state standard must be applicable. If a "general law federal standard" were applied, state law would be over-ridden, denying *Meredith v. Winterhaven,* 320 U.S. 228 (1943), wherein a federal court was charged with responsibility for determining and applying state laws in all cases within its jurisdiction in which the federal law does not govern.

Pulson v. American Rolling Mill Co., 170 F.2d 193 (1st Cir. 1948), held that there are two questions involved in determining diversity jurisdiction: First, has the state acted through legislation to bring a foreign corporation into its courts? And secondly, assuming the state has so acted, does this legislation violate the due process clause of the fourteenth amendment? In the principal case, Vermont had acted through legislation to make certain foreign corporations amenable to personal service of process. The federal question then arises, and it may be resolved by application of the doctrine of *International Shoe Co. v. Washington,* 326 U.S. 310 (1945), stating, ". . . due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and justice." Accord, *State ex rel. Coral Pools, Inc. v. Knapp,* 131 S.E.2d 81 (W. Va. 1963); *Gavenda Bros. v. Elkins Limestone Co.,* 145 W. Va. 732, 116 S.E.2d 910 (1960).

West Virginia has acted to make foreign corporations amenable to service of process in W. VA. CODE ch. 31, art. 1, § 71 (Michie 1961). Therein a foreign corporation not authorized to do business within the state but so doing is " . . . conclusively presumed to have appointed the auditor of the state as its attorney in fact with authority to accept service . . . ." The difficulty here arises with the interpretation of "doing business." 62 W. VA. L. REV. 181 (1959). *Walker v. General Features Corp., supra,* held that whether a corporation is doing business must be resolved by application of state or local law rather than federal law. State interpretation of "doing business" must be reasonable and consistent with due process to fulfill the interpretation of the *International Shoe Co.* case.

The West Virginia concept of "doing business" has been discussed in few cases. In *Rorer v. People's Bldg., Loan & Sav. Ass'n.,* 47 W. Va. 1, 34 S.E. 758 (1899), it was held that a foreign corporation can do business only through its agents. *Kimball v. Sundstrom & Stratton Co.,* 80 W. Va. 522, 92 S.E. 737 (1917), held that a foreign corporation maintaining offices in the state for the transaction of its business and employing persons there to look after its general business and preserve its property, in view of continuing its business within the state, is "doing business."

On the other hand, *Cumberland Co-op. Bakeries Inc. v. Lawson,* 91 W. Va. 245, 112 S.E. 568 (1922), held that a contract made in the state for the sale of capital stock of a foreign corporation does not constitute doing business, and *General Motors Acceptance Corp. v. Shadyside Coal Co.,* 102 W. Va. 402, 135 S.E. 272 (1926), held that a foreign corporation financing the purchase of automobiles secured by title to the vehicles, contracted for outside the state, through being handled through local banks does not constitute doing business.

It appears there is no set standard or recognized rule for determining the requirements of "doing business," but rather the determination must be made upon the facts of each particular case applying the state standard in a manner consistent with federal due process.

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